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Nos. 80-482 and 80-483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

ST. JOE MINERALS CORPORATION, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE

The National Coal Association (NCA) respectfully tenders this brief as *amicus curiae* for consideration by the Court. NCA supports the positions presented by the Lead Industries Association, Inc. (LIA) and St. Joe Minerals Corporation, and urges the Court to grant *certiorari* and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

THE INTEREST OF THE NATIONAL COAL ASSOCIATION

The membership of the National Coal Association consists primarily of coal producing and sales companies, whose operations comprise more than half of the commercial production in the United States. In addition, the Association numbers among its membership equipment manufacturers, railroads, coal exporters, consultants and other related industries.

This case is of major importance to the coal industry and to other industries represented by NCA in addition to the lead industries represented by petitioners. The national ambient air quality standards for lead, upheld by the court below, are based upon an excessively broad construction of EPA's statutory duty to set such standards only at the level requisite to protect public health. Under this construction, EPA has adopted standards designed to protect against a biological response not shown to be harmful to health. As a result, up to 80 percent of the nation's lead production capacity may be eliminated in an attempt to achieve an illusory health benefit.

EPA is presently considering revision of ambient air quality standards for sulfur oxide and total suspended particulate as they relate to human health, standards to which many NCA members are subject. If the opinion below is allowed to stand, and EPA proceeds to set these and other future standards on the same basis as the lead standard, unnecessary damage to the coal industry and other industries may result. Thus, the Court's decision in this case will directly affect the coal industry and many other U.S. industries as well.

ARGUMENT

By upholding the lead standard, the opinion below allows EPA to set national ambient air quality standards on the basis of biological responses not shown to be adverse to health, in contravention of congressional intent. The Court should therefore exercise its discretionary jurisdiction to hear this case and should reverse the judgment of the Court of Appeals.

As explained in the petition of the Lead Industries Association, EPA's 1.5 ug/m^3 air lead standard is designed to ensure maintenance of blood lead levels at or below 30 ug/dl (LIA Pet., p. 7). The 30 ug/dl level is aimed at protection against erythrocyte protoporphyrin (EP) elevation, a biological response associated with lead (*id.* at pp. 3, 7). EPA expressed "concern" about EP elevation at 30 ug/dl because of evidence that anemia, the major adverse health effect associated with lead, may occur at blood lead levels above 40 ug/dl (*id.* at pp. 7-8).

However, EPA was never able to explain how EP elevation at 30 ug/dl is adverse to health. Indeed, the Agency did not even find that anemia actually occurs at 40 ug/dl. Rather, EPA simply stated that its 1.5 ug/m^3 standard was necessary to protect the public health with an adequate margin of safety (Pet. App., p. 118a).[1] The Agency acknowledged that the standard might force closure of lead smelters accounting for up

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[1] LIA has pointed out that the lead Criteria Document contains substantial evidence indicating that anemia occurs only at blood lead levels above 40 ug/dl, and that this level may be considered a safe blood lead threshold, including an adequate margin of safety (LIA Pet., p. 8 & n. 7). As LIA also notes, EPA added cumulative, multiple margins of safety in addition to any such margin contained in the chosen blood lead threshold (LIA Pet., pp. 17-20).

to 80 percent of total U.S. lead production capacity, but stated that Congress did not intend economic considerations to play any role in the setting of national primary standards (LIA Pet., p. 6; Pet. App., p. 118a). The Court of Appeals upheld EPA's standard, stating that Congress intended EPA to set standards at levels ensuring "an absence of adverse effect," that Congress conferred upon EPA "broad discretion . . . to decide what effects to protect against," and that Congress clearly intended to preclude any consideration of the economic consequences of such standards (Pet. App., p. 43a).

It cannot be disputed that protection of the public health is the major goal of the Clean Air Act. However, in enacting the 1970 and 1977 Amendments to the Act, Congress intended to strike a reasonable balance between the need to protect public health and the need for continued industrial productivity and growth. Senator Gurney succinctly stated the problem during the Senate debate on the 1970 Amendments:

> The problem, as I see it, is one of balancing: How can we develop standards and procedures and controls which will reduce significantly the present level of air contamination, while at the same time not causing a severe economic dislocation.[2]

Senator Randolph voiced similar concerns:

> I feel that if we can achieve the objectives in the hoped-for time period, we would control and abate today's air pollution and also prevent in part the

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[2] SENATE COMMITTEE ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 93d Cong., 2d Sess. 291 (1974) [hereinafter referred to as 1970 Legis. Hist.].

> occurrence of future air pollution problems, and we would do so reasonably and realistically without doing violence to legitimate and necessary business.

1970 Legis. Hist. at 286; see 1970 Legis. Hist. at 111 (remarks of Rep. Staggers) (Act designed to "do what is feasible and what is reasonable").

Congress reiterated these concerns in enacting the 1977 Amendments. Both the Senate and the House bills were designed to ensure consideration of economic as well as public health needs. See S. Rep. No. 95-127, 95th Cong., 1st Sess. 2 (1977); H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 34 (1977). As Representative Rogers stated during the House debate:

> Clearly, continued strong action is needed to protect the public health and welfare.
>
> But it is equally clear that over the past few years our nation has been beset by serious economic and energy problems. These factors have presented a new challenge requiring a midcourse correction in the 1970 Clean Air Act; corrections which will help assure our nation's continued economic growth and vitality. 123 Cong. Rec. H4944 (daily ed. May 24, 1977).

Senator Hatch best expressed the problem on the Senate side:

> [I]f there is a conflict between the demands of clean air and those of economic development, the claims of pure air should not be considered automatically superior. Instead, a balance must be reached which will permit both the protection of air quality and the reasonable demands of the economy. We must not become rigidified into mak-

ing a fetish of the cleanliness of the environment. 123 Cong. Rec. S9197 (daily ed. June 8, 1977).[3]

Thus, in enacting the 1970 and 1977 Clean Air Act Amendments, Congress clearly intended to strike a reasonable balance between the nation's needs for public health protection and continued industrial vitality. Instead of relying upon EPA to determine directly how much industry could afford to spend on air pollution control, however, Congress placed the key to this delicate balance in EPA's determinations of the significance of health risks. The 1970 Amendments directed EPA to set national primary ambient air quality standards at levels which, "allowing an adequate margin of safety, are requisite to protect the public health" (42 U.S.C. § 7409(b)(1)).[4] The Senate Report stated that "[a]mbient air quality is sufficient to protect the health of . . . persons wherever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups . . . ." 1970 Legis. Hist. at 410. The Report further indicated that the Senate Committee's concerns were directed toward protection against "direct adverse effects upon public health." 1970 Legis. Hist. at 401. Thus, EPA was to confine its standard-setting efforts to protection against real harm, because protection against effects not shown to be directly adverse might result in unnecessary economic disruption.

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[3] See also 123 Cong. Rec. H4942 (daily ed. May 24, 1977) (remarks of Rep. Meeds), H4942-43 (remarks of Rep. Quillen), H4950 (remarks of Rep. Waxman).

[4] In contrast, national secondary standards are to be set at levels "requisite to protect the public welfare from any known or anticipated adverse effects" (42 U.S.C. § 7409(b)(2)).

This policy was confirmed during the hearings and debates preceding enactment of the 1977 Amendments. Senator Muskie, a principal author of both the 1970 and 1977 Amendments, repeatedly stated that some health effects might exist at levels below national standards, but that economic considerations precluded protection against such effects:

> And in response to . . . the best evidence we could get, we set standards for two purposes: First, to determine whether or not things as they were imposed unacceptable risks upon our people; and second, at what level we ought to hold further deterioration of the air to prevent its spread.
>
> That is what the 1970 Act was. We continue to try to take measurements on both of these points to insure that public policy is wise policy, that we are protecting health and not overprotecting it, to the degree of inhibiting economic growth and the opportunities people need in order to enhance their lives. . . .
>
> Our public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the time it was inaccurate, that there is a threshold. ***When we set the standards, we understood that below the standards that we set there would still be health effects.*** The standard we picked was simply the best judgment we had on the basis of the available evidence as to what the unacceptable health effects in terms of the country as a whole would be. ***Hearings on S. 251, S. 252 and S. 253 Before Subcomm. on Environmental Pollution of Senate Comm. on Environment and Public Works,*** 95th Cong., 1st Sess., Part 3 at 6-7, 8 (1977) (emphasis supplied).

Thus, national standards were intended to be "minimal standards" designed to "achieve a realistic goal

for cleanup in dirty air areas . . . without bringing their economies to a screeching halt." *Id.* at 37; see 123 Cong. Rec. S9423 (daily ed. June 10, 1977) (remarks of Sen. Muskie) (primary standards are "minimal" standards; even at primary standard level there are health effects not protected against).[5]

Congress further indicated in 1977 that national primary standards were not intended to protect against all health effects by enacting provisions designed to prevent significant deterioration of air quality in clean air areas (42 U.S.C. § 7470 *et seq.*). The first listed purpose of these "PSD" provisions is:

> (1) *to protect public health and welfare from any actual or potential adverse effect* which in the Administrator's judgment may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, *notwithstanding attainment and maintenance of all national ambient air quality standards*; . . . . (42 U.S.C. § 7470(1)) (emphasis supplied).

The House Report explains that the PSD provisions are intended, in part, "to protect public health from harmful exposures to air pollutants occurring at levels below the minimum national ambient air standards." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 8, 141 (1977); see 123 Cong. Rec. S9191 (daily ed. June 8, 1977) (remarks of Sen. Muskie).

In short, in enacting the 1970 and 1977 Amendments to the Clean Air Act, Congress intended to establish

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[5] Senator Muskie's remarks are quoted at pp. 15-16 of LIA's Petition.

an overall regulatory scheme designed to ensure a reasonable balance between public health protection and continued industrial vitality. EPA was directed to determine reasonable "thresholds" of significant health risk, and to set national standards protecting against such risk. *Cf. Industrial Union Dept., AFL-CIO* v. *American Petroleum Institute,* 100 S. Ct. 2844 (1980) (OSHA must set occupational health standards to prevent "significant" risk, not all risk, of harm).[6] Although Congress was aware that some health effects might exist below these threshold levels, it nevertheless chose this approach as the best method of protecting against significant health risks without causing unreasonable industrial interference.

By designing the lead standards to protect against a biological response not shown to be harmful to health, EPA has disrupted this regulatory scheme and tipped the balance in favor of excessive regulation. The lead industry maintains that the result may be the virtual destruction of this country's lead smelting industry. EPA's discretion to take such action must be limited now to prevent the coal industry and other industries from potentially suffering a similar fate.

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[6] In its Petition, LIA notes that Congress specifically adopted the "significant risk" approach in enacting the 1977 Amendments to the Act (p. 11 n. 8). See also p. 9, *supra* (remarks of Sen. Muskie).

CONCLUSION

The Court should exercise its discretion to grant *certiorari* in this case and should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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